

Finkelman v SBRE, LLC
2008 NY Slip Op 32660(U)
September 18, 2008
Supreme Court, Nassau County
Docket Number: 013159/2006
Judge: Ira B. Warshawsky
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SHORT FORM ORDER

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

HON. IRA B. WARSHAWSKY,

Justice.

TRIAL/IAS PART 10

PERRY FINKELMAN,

Plaintiff,

INDEX NO.: 013159/2006

-against-

FRIVOLOUS CONDUCT

SBRE, LLC, CHECKMATE HOLDINGS, LLC
and MAKSIN LEGAL GROUP, PLLC,
as ESCROW AGENT,

Defendants.

The following papers read on this application:

Affirmation in Opposition to Impose Plaintiff's Costs and Attorney's Fees on Defendant SBRE, LLC of Albert Feinstein, Esq. & Exhibits Annexed	1
Reply Affirmation in Support of the Imposition of Sanctions and Costs Including Attorney's Fees against Defendant, SBRE, of Matthew Dollinger, Esq. & Exhibits Annexed	2

Pursuant to a decision of this court, rendered after trial of the above captioned case, (dated June 5, 2008), the court directed the defense to show cause why it should not be sanctioned for frivolous conduct. More specifically, defense counsel was requested to show cause why it should not be sanctioned for putting forth, as both a defense and a counterclaim in the instant action, a theory of law that the defendant used to defend **itself** in the action pending in the Supreme Court of the County of Kings started shortly before this action was filed in Nassau County. The defendant in the instant case contended that the plaintiff in the Kings County case could not succeed on its claim for the same reasons that our plaintiff contends that the defendant must lose in the instant case. In the decision of June 5, 2008, the court stated:

The court finds and declares that the plaintiff was entitled to a simultaneous closing of the Agreement conveying the air rights appurtenant to Lot 92 with the land of Lot 110 and the air rights appurtenant to Lot 89. That SBRE could not convey said air rights as of the closing date of the Purchase Agreement for Lot 110 and the air rights appurtenant to Lot 89 because it did not own said air rights as of June 9, 2006. In fact Sea Breeze Development, LLC, not SBRE, LLC, was the contract buyer of the Air Rights appurtenant to Lot 92 (Ex. 9).

* * *

Thus, not only could SBRE not sell what it did not own, but also it could no longer buy what it needed in order to convey it to the plaintiff, and the Attorney General's approval became meaningless in that neither Sea Breeze Development nor SBRE, LLC could legally buy the air rights to Lot 92 after June 9, 2006. The weakness of defendant's claim to a valid adjournment that would trump the simultaneous closing clause is seen in the complaint they filed against C&D, dated July 24, 2006, contending C&D's lack of an interest in the adjacent lots to Lot 92 precluded any claim by C&D to a right to purchase the Synagogue's air rights.

* * *

Perhaps the strongest basis for a claim of frivolous conduct is that the defendants, in an action commenced on July 24, 2006 against C&D (before the plaintiff commenced this action on August 15, 2006 as previously noted), claimed:

... 'C&D had no interest in any of the adjacent lots and thus, certainly, could have no conceivable use of the Lot 92 Development Rights' and that '[i]t cannot be overemphasized that Lot 92 Development rights had no monetary value to C&D (who had no interest of any kind in the adjacent lots) other than to extort monies from the Plaintiffs who were the developers of the adjacent lot' (see Exhibit '20' or Exhibit 'V', at unnumbered paragraphs between paragraphs designated 9 and 10 and at ¶ 16).

It is clear to this court that the above allegation made by Sea Breeze Development and SBRE against C&D in the Brooklyn matter are the same that can be made against SBRE in our case, that it has "no interest in any of the adjacent lots." In other words, how can SBRE argue here that they have any air rights to convey appurtenant to Lot 92 after they are no longer owners of property adjacent to Lot 92 when they argued, in the C&D case, that C&D had no valid claim because C&D did not own property adjacent to any of the lots in issue?

Defendant argues that the decision of Justice Demerest, Supreme Court, Kings County, clearly establishes and supports that defendants, SBRE's, legal position in filing its answer and

counterclaims in defending the instant action was a valid one. The standard for determining whether the conduct of a party has been frivolous is fairly clear. Conduct during litigation is frivolous and subject to sanction and/or the award of costs when it is completely without merit in law or fact and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law; it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or it asserts material factual statements that are false. 22 NYCRR 130 – 1.1(c).

Defendant argues that the court must consider the circumstances under which the conduct took place and whether or not the conduct was continuing and its lack of legal or factual basis was apparent or should have been apparent. Glenn v. Annunziata, 53 A.D. 3d 565 (2d Dept. 2008); 130 – 1.1(c).

The defendant argues that Justice Demarest dismissed the claims of C&D because they did not have an enforceable contract. On the other hand, he argues that SBRE did have an enforceable contract against Finkelman, thus differentiating it from the position that SBRE took in this case compared to the position they took in the C&D case in Kings County.

Defendant has a serious problem. Essentially the reason that C&D did not have an enforceable contract in Kings County, to buy the air rights of Lot 92, was that they were not an owner of land adjoining Lot 92. The exact same reason that SBRE failed in the instant action. They also were not an owner of land abutting Lot 92 as of June 6, 2006 and the defendant was aware of it as of that date.

Defendant knew the importance of being an abutting land owner in order to buy the air rights of Lot 92. Defendant knew that when he raised this defense to the breach of contract claim that C&D had bought against SBRE. Thus, from the very beginning of this litigation defendant was aware that the legal theory that it proffered in the C&D case, was the opposite position it took as a defendant in the instant action. It never withdrew that position, it never modified that position, and finally it maintained that position through discovery, the trial and in the written summations. The facts in the aforementioned Glenn case differ dramatically. In the Glenn case, after the plaintiff had taken a deposition which exonerated defendant from any liability, the plaintiff offered to withdraw the action against said defendant. In the instant case, such

conciliatory action was never taken by the defendant.

The court is unaware as to why the defendant did maintain that position, which the court concludes was without merit in law or fact. It would appear that such position was undertaken primarily to delay the resolution of the litigation. It allowed the escrowee, the Maksin Legal Group, to maintain possession of the down payment of \$250,000, for over 2½ years.

The court is also able to understand the disappointment of Mr. Fleishmakher, who intended to “flip” the air rights for a profit of \$3,700,000 – based upon a purchase price of \$550,000 – and perhaps that was his motivation to continue the defense and counterclaims that were proffered in this particular case.

Lest there be a lack of understanding, or a misunderstanding, of what the frivolous conduct of the defendant was in this case, the court wishes to be perfectly clear. There was a lack of legal or factual basis for the defendant's conduct in putting forth to this court and the plaintiff, a defense and counterclaims that relied upon the defendant being an owner of property adjacent to Lot 92 when neither Seabreeze Development, LLC, nor SBRE, owned land adjacent to Lot 92 after June 9, 2006. C&D never owned land adjacent to Lot 92 and this was argued to the court in Brooklyn by SBRE and Seabreeze, in defending C&D's claim for breach of contract.

Mr. Finkelman has been injured in having to pay \$110,000 to plaintiff's counsel, \$5,378.40 for disbursements, and has lost the ability to earn interest on the \$250,000 being held by the Maksin Legal Group. It is the court's opinion, that a party's attempts to make arguments in a subsequent action that are inconsistent, or actually polar opposites, to those made by the same party in an earlier action warrant the imposition of sanctions pursuant to 22 NYCRR section 130.1 – 1(c). See Transaero, Inc. v. Biri Associates Corp., 39 A.D.3d 738 (2d Dept. 2007). In Transaero, plaintiff's attempts to defend a summary judgment motion founded on Statute of Limitation grounds were found frivolous and sanctionable when the plaintiff himself had filed another action two years earlier therein belying his claim of lack of knowledge of defendant's alleged criminal acts.

The court hereby imposes upon the defendant, SBRE, costs of the litigation incurred by the plaintiff and reasonable attorney's fees limited to the seven day trial of this action.

The matter shall be put down for a hearing to be held before Court Attorney/Referee

Frank Schellace, Room 060, Special 2 Courtroom, Lower Level, on October 23, 2008, at 9:30 A.M., to "hear and report" his findings to the court.

Dated: September 18, 2008



J.S.C.

ENTERED
SEP 26 2008
NASSAU COUNTY
COUNTY CLERK'S OFFICE